SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-233

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SUPREME COURT, U.S.

THE PEOPLE OF THE STATE OF MICHIGAN

Petitioner

vs.

WILLIE ELLIS JAMES WALTON

Respondent

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
THE STATE OF MICHIGAN

MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES your Respondent, WILLIE ELLIS JAMES WALTON, by and through his attorney, Steven Rabinovitz, and in support of his motion to proceed in forma pauperis says as follows:

1) That he is the respondent in the pending proceeding.

2) That he has substantial interest in responding to said petition and showing this Court why said petition should not be granted.

3) That respondent is without funds to hire an attorney or to file a formal response as required under Rule 22 fo the Rules of the Supreme Court.

4) That respondent requested appointment of counsel to prepare post conviction proceedings following his conviction in the Recorder's Court for the City of Detroit, which request was granted by said court.

WHEREFORE, respondent prays that he be permitted to proceed in forma pauperis as provided in Rule 46 of the Rules

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of the Supreme Court.

Respectfully submitted,

BERNSTEIN & RABINOVITZ, P.C.

BY: _____

Steven Rabinovitz
Attorney for Respondent
28091 Dequindre, Ste 206
Madison Heights, Mich. 48071
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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

WILLIE ELLIS JAMES WLTON, being first duly sworn, deposes and says as follows:

1) He is the respondent in the above-entitled action and makes this Affidavit in support of his Motion for Leave to Proceed in Forma Pauperis.

2) Affiant is unable, because of his poverty, to pay fees and costs of this case or give security therefor.

3) This is in response to a Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan, reversing Affiant's conviction and barring retrial on a dismissed count, and raises substantial question of constitutional law, as more fully set forth in Petitioner's Application previously filed. Affiant believes he is entitled to respond to said Petition.

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Further deponent sayeth not.

Willie Ellis James Walton

WILLIE ELLIS JAMES WALTON

Subscribed and sworn to before me this 21st day of November, 1990.

Yvonne Marie Gerace

NOTARY PUBLIC

YVONNE MARIE GERACE
Notary Public, Macomb County, Michigan
My Commission Expires March 11, 1991
ACTING IN WAYNE COUNTY

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RESPONDENT'S REPLY IN OPPOSITION

BERNSTEIN & RABINOVITZ, P.C.
Attorney for Respondent

By: Steven Rabinovitz
STEVEN RABINOVITZ, P 19174
28091 Dequindre, Ste 206
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RESPONDENT'S REPLY IN OPPOSITION

NOW COMES Respondent, WILLIE ELLIS JAMES WALTON, by and through his attorney, Steven Rabinovitz, in reply to a Petition for Writ of Certiorari to review the judgment of the Court of Appeals of the State of Michigan, entered in the above-entitled cause on January 10, 1980, leave to appeal denied by the Michigan Supreme Court on June 10, 1980, and prays that said Writ be denied.

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RE-STATEMENT OF QUESTION PRESENTED

WHERE DEFENDANT'S CONVICTION ON ONE COUNT ON A WAIVER TRIAL IS REVERSED DUE TO A STATUTORY DEFECTIVE JURY WAIVER, IS RE-TRIAL BARRED ON A SECOND COUNT ON WHICH THE DEFENDANT WAS ACQUITTED ON PRINCIPALS OF DOUBLE JEOPARDY?

REASONS FOR DENYING THE WRIT

The petitioner relies on Serfass v United States, 420 US 377, 95 S Ct 1055, 43 LEd2d 265 (1975) to support the proposition that the trial court in the instant case had no jurisdiction to determine the guilt or innocence of the defendant. However, it should be remembered that in Serfass, the appeal was from a decision of the trial court dismissing the indictment based on a stipulation of facts between the defendant and the prosecution. Had the trial court's decision been to deny the motion the defendant would have proceeded to trial but would not have been found guilty. Clearly, in such a situation, jeopardy had not attached.

Quite the contrary is true in the instant case when defendant in fact has been arraigned on the information, pleaded on the information and went to trial. The general rule as to when jeopardy attaches in a non-jury trial is where the "accused has been indicted and arraigned, has plaeded and the court has begun to hear evidence", McCarthy v Zerbst, 85 F2d 640, 642 (CA 10 1936).

Certainly the instant situation is more synonomous with the holdings in United States v Hill, 473 F2d 759 (1972), United States v Findley, 439 F2d 970 (CA 1 1971) and United States v Sisson, 399 US 267, 26 L Ed2d 608, 90 SCt 2117 (1970), all of which specifically held held jeopardy to have attached

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where the trial court began to hear evidence of facts outside of the indictment. Indeed, if the petitioner's position were to be upheld it would permit appeals by the prosecution of a not guilty verdict if the prosecutor felt there was any error in the selection of the fact finder. Such certainly was not the intention of Serfass.

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CONCLUSION

WHEREFORE, for the foregoing reasons, respondent requests that plenary review be denied.

Repectfully submitted,

BERNSTEIN & RABINOVITZ, P.C.

By: _____

STEVEN RABINOVITZ, P 19174
Attorney for Respondent
28091 Dequindre, Ste 206
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Dated:November 21, 1980

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AFFIDAVIT OF MAILING

NOW COMES, Yvonne Gerace , being first duly sworn, and deposes and says that on the 21st day of November, 1980, she did serve upon:

Ms. Anne B. Wetherholt
Assistant Prosecuting Attorney
for Wayne County
12th floor
Frank Murphy Hall of Justice
1441 St. Antoine
Detroit, Mich. 48226

the following Respondent's Reply in Opposition to a Petition for Writ, Motion to Proceed in Forma Pauperis, Affidavit in Support of Motion and Affidavit of Mailing, by placing same in the regular United States Mail, properly addressed and with sufficient postage thereon.

Yvonne Gerace

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND

Subscribed and sworn to before me this 21st day of November, 1980.

STEVEN RADINOVITZ
Notary Public, Oakland Co., Mich.
My Comm. Expires July 19, 1981

NOTARY PUBLIC

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